FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]

No. [illegible]

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,
vs.
HENRY PLOOCK,
Respondent.

No. [illegible]

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,
vs.
MARJORIE A. HANSON, as Administratrix of the Estate of George E. Hanson, Deceased,
Respondent.

No. 507

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,
vs.
ELMER VAN SLYKE,
Respondent.

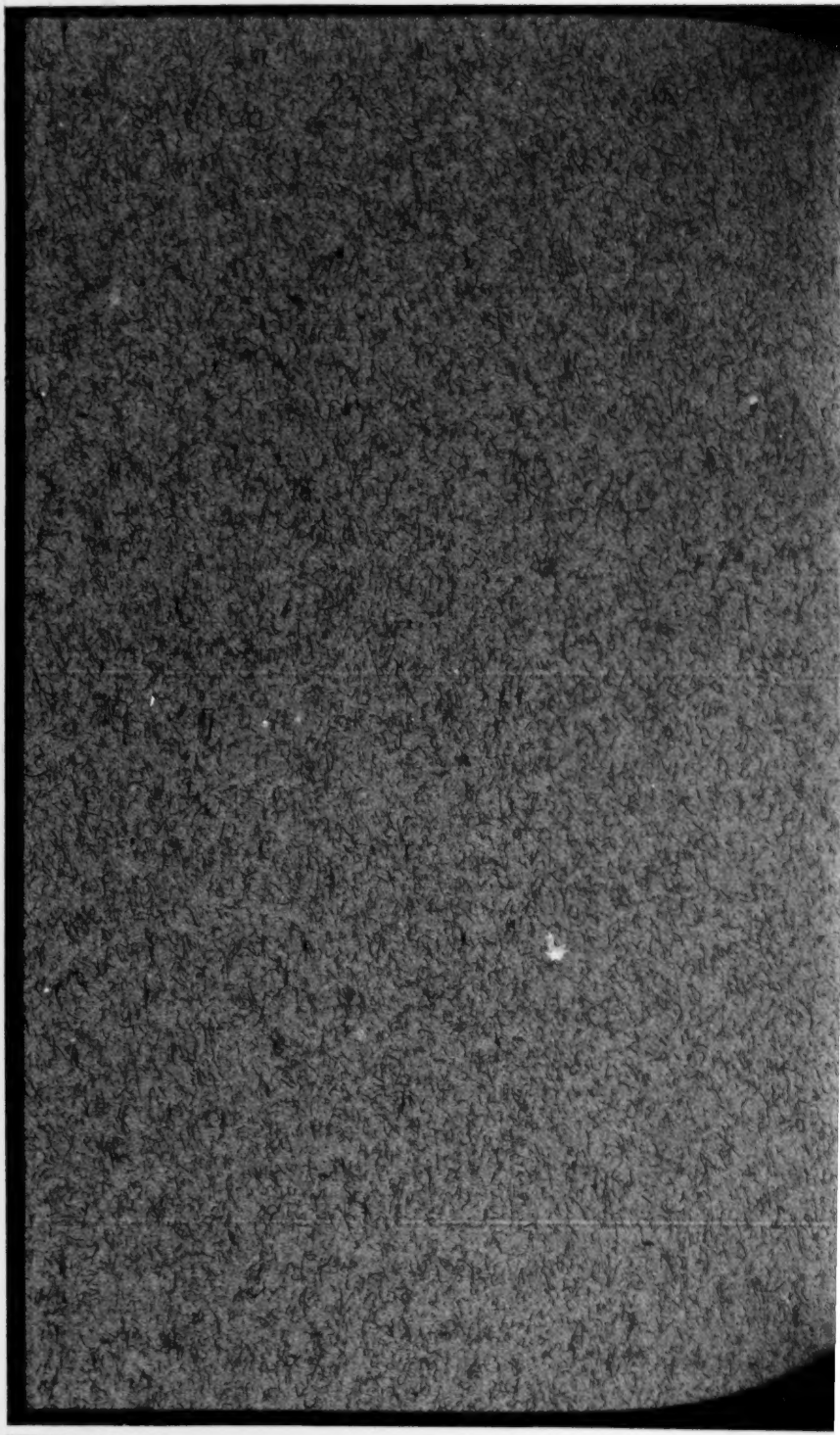
No. 508

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,
vs.
CAROLINE LYNCH, as Administratrix of the Estate of Henry George Lynch, Deceased,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

Strang, Bodine, Wright & Conlan,
Attorneys for Petitioner,
Office and Post Office Address,
800 Powers Building,
Rochester 4, New York,

William C. Conlan,
Of Counsel.



INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	2
Jurisdictional statement	3
The question presented	4
Reasons relied upon for allowance of writ	5
Prayer for writ	5
Brief in support of petition for writ of certiorari	7
The opinion below	7
Jurisdiction	8
Statement of the case	8
Specification of errors	8
Argument	9
Point I—The impeaching testimony which the Circuit Court rejected would be admissible on separate trials of the actions herein	9
Point II—The decision of the Circuit Court herein is contrary to the holdings of this Court that consolidation shall not deprive a defendant of any material right	10

Table of Cases Cited

Eppinger & Russell Co. v. *Sheely*, 24 F. (2d) 153 (C. C. A. 5)	9
Johnson v. *Manhattan R. Co.*, 289 U. S. 479, 496, 53 Sup. Ct. 721, 77 L. Ed. 1331	4, 10
Majestic v. *Louisville & N. R. Co.*, 147 F. (2d) 621 (C. C. A. 6)	9
Mideastern Contracting Corp. v. *O'Toole*, 55 F. (2d) 909 (C. C. A. 2)	9
Mutual Life Insurance Co. v. *Hillmon*, 145 U. S. 285, 293, 12 Sup. Ct. 909, 36 L. Ed. 706	4, 10
Paxson v. *Davis*, 65 F. (2d) 492, 62 App. D. C. 146, Cert. Den., 290 U. S. 643, 54 Sup. Ct. 61, 78 L. Ed. 558	9

Page

Spiller v. *Atchison, T. & S. Ry. Co.*, 253 U. S. 117, 121, 40 Sup. Ct. 466, 64 L. Ed. 810 4
Sprinkle v. *Davis*, 111 F. (2d) 925 (C. C. A. 4) 9
U. S. v. *Trenton Potteries Co.*, 273 U. S. 392, 47 Sup. Ct. 377, 71 L. Ed. 700 9
Wabash Screen Door Co. v. *Black*, 126 Fed. 721 (C. C. A. 6) 9

TABLE OF STATUTES

28 U. S. C. § 347 ..... 3, 4, 8
28 U. S. C. § 734 3
Supreme Court Rule 38, Paragraph 5 (b) 3, 8
Rule 42 (a), Federal Rules of Civil Procedure 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 595

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

HENRY PLOUGH,
Respondent

No. 596

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

MARJORIE A. HANSON, AS ADMINISTRATRIX OF THE ESTATE OF GORDON M. HANSON, DECEASED,
Respondent

No. 597

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

ELMER VAN SLYKE,
Respondent

No. 598

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

CAROLINE LYNCH, AS ADMINISTRATRIX OF THE ESTATE OF MYRON GEORGE LYNCH, DECEASED,
Respondent

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Hon. Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Baltimore and Ohio Railroad Company, respectfully shows:

Summary Statement of the Matter Involved

On January 8, 1944, at a grade crossing of the petitioner railroad in Cattaraugus County, New York, a collision occurred between one of petitioner's trains and a truck owned by the Iroquois Gas Corporation (R. 29, 70-73, 188). In the truck at the time of the collision were Henry Plough, Elmer Van Slyke, Gordon Hanson and Myron Lynch, all employees of the Gas Corporation (R. 71, 73). Plough and Van Slyke received injuries as a result of the collision, and Hanson and Lynch were killed (R. 78, 128, 129, 347).

Actions in negligence were brought against petitioner in the United States District Court for the Western District of New York by Plough and Van Slyke individually, and by the estates of the decedents (R. 3-17). The said actions, although brought separately, were tried together before Hon. John Knight and a jury, resulting in jury verdicts of no cause of action in all four cases (R. 19, 20, 27).

Since all the occupants of the truck were acting in the course of their employment at the time of the accident, the Iroquois Gas Corporation as their employer was required to make payments under the New York State Workmen's Compensation Law to the surviving employees and to the estates of the decedents (R. 105, 107). Under the New York law the Iroquois Gas Corporation, the said employer, had a lien on the recovery in each of the actions herein for the amount of the compensation payments which it had made, and thus had a substantial financial interest in any verdict rendered in the actions (R. 106). Respondent Henry Plough, who was not seriously injured, had returned to work for the Gas Company prior to the trial of these actions and was so employed while the trial was in progress (R. 88, 103). He testified in each of the four actions herein, as plaintiff in his own case under questioning by his own attorney, and then as a witness for the plaintiffs in the other

three cases under questioning by their separate attorney (R. 70-83). Petitioner railroad introduced evidence of the Gas Company's above described interest in the outcome of the actions herein since it bore directly on the credibility of the Company's employee Plough (R. 92). The Trial Court admitted the testimony only for the purpose of showing bias on the part of such employee (R. 104, 107, 405).

The four judgments entered upon the jury's verdicts were appealed to the United States Circuit Court of Appeals for the Second Circuit and argued together before that Court (R. 23, 24, 413). The Circuit Court, Judge Swan dissenting, reversed the judgments below and directed new trials in all four actions (R. 413-421). Such reversal was based solely on the admission of the aforementioned impeaching testimony (R. 415, 416).

Petition for re-hearing was denied by the Circuit Court on November 21, 1947 (R. 426).

Jurisdictional Statement

Judgments in the four actions were entered by the Circuit Court of Appeals for the Second Circuit on the 5th day of November, 1947 (R. 418-421). The order of that Court denying petitioner's application for a re-hearing in all of said cases was filed on the 21st day of November, 1947 (R. 426). This Petition was filed on the 14th day of February, 1948. The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code (28 U. S. C., § 347).

By its decision herein and the judgments entered thereon the Circuit Court of Appeals for the Second Circuit "has decided a federal question in a way probably in conflict with applicable decisions of this court." (Supreme Court Rule 38, Paragraph 5(b)). The United States Code, Title 28, § 734 and Rule 42(a) of the Federal Rules of Civil Procedure provide for the consolidation or joinder of trial of actions involving a common question of law or fact. This

Court has stated that such consolidation shall not deprive any defendant without its consent of any right material to its defense.

Mutual Life Ins. Co. v. *Hillmon*, 145 U. S. 285, 293, 12 S. Ct. 909, 36 L. Ed. 706;

Johnson v. *Manhattan Railway Co.*, 289 U. S. 479, 496, 53 S. Ct. 721, 77 L. Ed. 1331.

The right of a defendant to impeach the plaintiff's witnesses by introducing evidence of their bias is one that has long been recognized by the Federal courts. Nevertheless, the Circuit Court by its decision herein deprived petitioner of that right on the sole ground that the three actions, in which the plaintiff's witness was impeached, were consolidated for trial with a fourth action in which the said witness was himself the plaintiff.

Jurisdiction should not be denied herein because the judgments of the Circuit Court are not final adjudications of the merits of the respondents' claims. This Court has explicit authority to review the decision of a Circuit Court "either before or after a judgment or decree by such lower court." (28 U. S. C., § 347); and it properly allows a writ of certiorari where to deny it would merely protract litigation.

Spiller v. *Atchison, T. & S. Ry. Co.*, 253 U. S. 117, 121, 40 S. Ct. 466, 64 L. Ed. 810.

The Question Presented

Whether the defendant in an action shall be deprived of the right to show bias and prejudice on the part of a witness for plaintiff, solely because of the fact that the action, at the direction of the Court, is being tried jointly with another action brought by the said witness against the same defendant.

Reasons Relied Upon for Allowance of Writ

Judgments in favor of the petitioner herein were reversed by the Circuit Court on the sole ground that there was error by the Trial Court in admitting evidence offered by petitioner to attack the credibility of a witness for plaintiffs (R. 415-416). The Circuit Court recognized that under the rules of evidence applying in Federal courts the petitioner would have had an "undoubted right" to introduce such evidence had the actions herein been tried separately (R. 415). The Circuit Court held that the admission of the evidence in question was error solely because a joint trial was had of all four actions, *i. e.*, because the plaintiffs' witness whose credibility was being attacked on cross-examination by petitioner was also a plaintiff in one of the consolidated actions.

This Court held in

Mutual Life Ins. Co. v. *Hillmon (supra);* and.
Johnson v. *Manhattan Railway Co. (supra)*

that consolidations of actions shall not deprive a defendant without its consent of any right material to its defense. The decision of the Circuit Court herein is probably in conflict with those decisions of this Court.

WHEREFORE, your petitioner, Baltimore and Ohio Railroad Company, prays that a writ of certiorari issue to review the judgments entered in the above causes on the 5th day of November, 1947, in the United States Circuit Court of Appeals for the Second Circuit, said causes being Nos. 20591, 20592, 20593 and 20594 on the docket of the said Circuit Court.

Respectfully submitted,

BALTIMORE AND OHIO RAILROAD COMPANY,
By WM. C. COMBS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 595

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

HENRY PLOUGH,
Respondent

No. 596

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

MARJORIE A. HANSON, AS ADMINISTRATRIX OF THE ESTATE OF GORDON M. HANSON, DECEASED,
Respondent

No. 597

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

ELMER VAN SLYKE,
Respondent

No. 598

BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

CAROLINE LYNCH, AS ADMINISTRATRIX OF THE ESTATE OF MYRON GEORGE LYNCH, DECEASED,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion Below

The opinion in the United States Circuit Court of Appeals for the Second Circuit (Circuit Judges L. Hand, Swan and Chase, Judge Chase writing, Judge Swan dissenting) was

filed November 5, 1947, and appears at pages 413 of the record. It is reported in 164 Fed. (2d) 254.

Jurisdiction

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code (28 U. S. C., § 347). The Circuit Court of Appeals has in these cases "decided a federal question in a way probably in conflict with applicable decisions of this court." (Supreme Court Rule 38, Paragraph 5(b)).

Judgments were entered in these cases by the United States Circuit Court of Appeals for the Second Circuit on November 5, 1947. Petitioner's application for a re-hearing was denied by that Court by order filed on November 21, 1947.

Statement of the Case

The facts have already been set forth in the preceding petition at pages 1-5 and are hereby adopted and made a part of this brief. We emphasize only that the witness Plough, whose credibility was attacked by petitioner, testified first as party-plaintiff in his own case under questioning by his own attorney (R. 70-80) and then as a witness for the plaintiffs in the other three cases under questioning by the separate attorney for the plaintiffs in those cases (R. 80-83). He was then cross-examined both as a party and as a witness (R. 83-108).

Specification of Errors

The Circuit Court erred in holding that the petitioner could not impeach the testimony of the witness Plough, by showing the interest of his employer in the outcome of the actions herein, solely because of the fact that the three actions in which Plough appeared as a [illegible]ss for the plaintiff were consolidated for trial with a [illegible]action in which Plough himself was plaintiff.

ARGUMENT

Point I

The Impeaching Testimony Which the Circuit Court Rejected Would Be Admissible on Separate Trials of the Actions Herein.

The Circuit Court recognized petitioner's "undoubted right" under Federal rules of evidence to impeach witnesses for plaintiff by showing bias in the manner that was followed by the petitioner herein (R. 415). Numerous Federal decisions, including some of this Court, have established such right. See:

U. S. v. *Trenton Potteries Co.*, 273 U. S. 392, 47 S. Ct. 377, 71 L. Ed. 700;

Wabash Screen Door Co. v. *Black*, 126 Fed. 721 C. C. A. 6);

Mideastern Contracting Corp. v. *O'Toole*, 55 F. (2d) 909 (C. C. A. 2);

Paxson v. *Davis*, 65 F. (2d) 492, 62 App. D. C. 146 Cert. Den., 290 U. S. 643, 54 S. Ct. 61, 78 L. Ed. 558;

Eppinger & Russell Co. v. *Sheely*, 24 F. (2d) 153 (C. C. A. 5).

In *Sprinkle* v. *Davis*, 111 F. (2d) 925, the Circuit Court of Appeals for the Fourth Circuit admitted testimony identical in nature with that offered by the petitioner herein. It was in reliance upon the decision in that case that the Trial Court admitted the testimony in the instant actions (R. 88-97).

In *Majestic* v. *Louisville & N. R. Co.*, 147 F. (2d) 621, exactly the same testimony was offered; and the Sixth Circuit held it to be admissible. The Circuit Court below cited these cases wiht aproval (R. 415). There are no Federal cases holding to the contrary.

Point II

The Decision of the Circuit Court Herein Is Contrary to the Holdings of this Court that Consolidation Shall Not Deprive a Defendant of Any Material Right.

In *Mutual Life Insurance Co.* v. *Hillmon*, 145 U. S. 285, 293, 12 S. Ct. 909, 36 L. Ed. 706, this Court discussed the effect of consolidation in the following language:

> "But, although the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments; and no defendant could be deprived, without its consent, of any right material to its defense, whether by way of challenge of jurors, or of objection to evidence, to which it would have been entitled if the cases had been tried separately."

In *Johnson* v. *Manhattan R. Co.*, 289 U. S. 479, 496, 53 S. Ct. 721, 77 L. Ed. 1331, the Court said:

> "Under the statute, U. S. C., title 28, § 734, consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another."

The Circuit Court in reversing jury verdicts for petitioner herein stated in part:

> "* * * we hold that it was an abuse of discretion to permit the introduction of evidence so prejudicial to the plaintiffs where the witnesses whose credibility was in question were parties to the litigation" (R. 416).

Unless the decision of the Circuit Court is reversed by this Court, petitioner, solely by reason of the consolidation of the actions herein, is thus deprived of a right material to

its defense, *i. e.*, the right to impeach the credibility of the plaintiffs' witnesses.

It is, therefore, respectfully submitted that these cases call for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the judgments of the Circuit Court below.

WM. C. COMBS,
Counsel for Petitioner.

(4838)